Case No. 18325

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

WILLIAM CODY KELLY, TRUSTEE
Under Trust Dated December 12, 1962,
Plaintiff,
vs.
STATE OF CALIFORNIA, STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

EXPLANATORY ORDER CONCERNING THE AWARD OF COSTS AND UPPAWAY COVERAGE

INTRODUCTION

For various reasons (principally Uppaway's coverage issues which required additional engineering studies and a major dispute over the award of costs), well over a full year has elapsed since the Decision in this case was handed down on July 12, 1990.

Even in a case of such magnitude and complexity, the Court feels that too much time has now elapsed since trial. Justice requires an end to the continuing advocacy in this case, at least in the trial court. Accordingly, the Court is, *sua sponte*, cutting off further pleadings and arguments and intends by this Order to resolve the issues that remain. Simultaneously, the Court will cause the filing of its Findings of Fact, Conclusions of Law and final Judgment.

SOME GENERAL AND SPECIFIC COMMENTS ABOUT COSTS:

In his lawsuit, Mr. Kelly asked the Court to declare the remaining lots in the subdivision owned by his Trust to have a special legal status which exempts them from many of the rules and practices promulgated by the TRPA since the subdivision was created. He wanted a priority status declared for those purchasers who might wish to build residences on his hilltop building sites. In the main, the Court agreed with this narrow assertion and granted Mr. Kelly some relief. By itself, the Declaratory Relief action would have required perhaps a week or less for a full resolution. Clearly, however, Mr. Kelly sought to accomplish more by his lawsuit — much, much more.

On top of the simple Declaratory Relief claims, Mr. Kelly mounted an impressive but losing inverse condemnation lawsuit and, expending enormous additional time and talent, he launched as well a wholesale challenge attacking the actions of TRPA for the last decade and the underlying scientific theories for TRPA's most recent regulatory system, IPES. The trial took not one, but five weeks to try, with more than a score of expert witnesses. Both the TRPA and the State of California are entitled to costs for having successfully defended these inverse condemnation claims and other jurisdictional attacks on their activities. The question is, what award is fair?

In this connection, subsection (5) of Nevada Revised Statutes 18.005 seems to give the Court a wide latitude and discretion in determining reasonable fees. By including a flexible ceiling on fees in the amount of $1,500.00 per witness, it also seems to contain an implied caution to limit the unapproved proliferation of expert witness fees. The Court also chooses to interpret this statute as allowing the Court to determine [reasonable] fees not only from the standpoint of the services rendered and the direct rate charged by the expert, but perhaps reasonable also from the

standpoint of the resulting burden on the payor, considering all the special circumstances of the case *see* NRS 18.050 and *Magee v. Whitaker*, 60 Nev. 202 at p. 205 (1939) (discretion given in actions in equity).

Together, the TRPA and the State of California are seeking costs in this case of $339,373.22. Of that figure, the bulk of the claim relates to costs associated with expert witness fees, especially those including:

Expert Witness:	Actual Fee:
Mr. Kenneth Foster	$15,111.01
Stephen Jonhson	$26,919.68
William Morgan	$ 9,098.17
Milt Sharpe	$ 7,004.08
Martin Townsend	$ 7,613.13
Dr. Thomas Cahill	$ 7,714.00
Mr. David Dawdy	$20,557.55
Dr. Thomas Dunne	$29,158.55
Dr. Charles Goldman)	
Dr. Earl Byron)	$58,884.28
Mr. Lawrence Livingston	$12,357.45
Dr. Robert Twiss)	
Dr. Robert Costs)	$81,509.41
TOTAL	$275,927.31

If a Court were to mechanically award all prayed-for costs to the prevailing party in every case, a situation could result where a person of little means would be unfairly penalized for having initiated a lawsuit in good faith. Obviously, that precise situation does not apply here. Surely, neither Mr. Kelly nor his Trust are paupers. On the other hand, a portion of their lawsuit may be looked at as having performed something of a public service for a number of factions interested in development in the Tahoe Basin and other factions interested in controlling growth. The case was tried as something of a "test" case.

With all of these considerations in mind, the Court has determined to limit the award of costs for experts to the sum of $20,000 for each of the several experts named above whose statements exceed that figure. Accordingly, the Court is retaxing the costs to the figure of $198,897.84, computed as follows:

See landscape Table, page C-5.

The Court has also chosen to disallow Mr. Beather's fee of $352.00 and the fee of Cartlidge Steel & Company for $155.00, and the sum of those figures, $507.00, will be deducted.

Finally the Court is going to make a further adjustment reflecting a credit to the Plaintiff by reason of some of the expert witness testimony expenses incurred by the *Plaintiff* during the presentation of his evidence on issues involving adjudicated rights, however small by comparison those fees might seem.

Indulging in assumptions which the Court feels are most favorable towards the Plaintiff, certainly no more than 25% of Mr. Durbin's and 25% of Mr. Mahanna's time could be said to be "on site" work in the sense that they were examining the exact system at Uppaway for the purpose of establishing Uppaway's need to be eliminated from the allotment process represented by IPES. The Court has never seen a statement for either Mr. Durbin or Mr. Mahanna, but the Court suspects that both probably exceeded by several times the $20,000.00 ceiling.

Expert Witness:	Actual Fee:	Reduced By:	Final Award:
Mr. Kenneth Foster	$15,111.01	0	$15,111.01
Stephen Johson	$26,919.68	$ 6,919.68	$20,000.00
William Morgan	$ 9,098.17	0	$ 9,098.17
Milt Sharpe	$ 7,004.08	0	$ 7,004.08
Martin Townsend	$ 7,613.13	0	$ 7,613.13
Dr. Thomas Cahill	$ 7,714.00		$ 7,714.00
Mr. David Dawdy	$20,557.55	$ 557.55	$20,000.00
Mr. Thomas Dunne	$29,158.55	$ 9,158.55	$20,000.00
Dr. Charles Goldman) Dr. Earl Byron)	$58,884.28	$18,884.28	$40,000.00
Mr. Lawrence Livingston	$12,357.45	0	$12,357.45
Dr. Robert Twiss) Dr. Robert Coats)	$81,509.41	$41,509.41	$40,000.00
	$275,927.31	$77,029.53	$198,897.84

Using the same rationale as used for the Defense experts, the Court has determined to award Plaintiff $5,000.00 each for Prof. Mahanna and Mr. Durbin. Similarly, the Court sets as reasonable fees which are site specific at Uppaway for Mr. Guerrant's work the amount of $5,000.00 (1/4 of the ceiling). Additionally, fees for Mr. Naphan are awarded in the amount of $5,000.00 (most of his work). The total $20,000.00, will constitute a further reduction in the award of costs to the prevailing Defendants.

All of the remaining costs, while neither normal or customary in a strict sense, represent costs which could be expected to be incurred in the handling of the defense in a case as extraordinary and wide-ranging as this case. They are awarded in full. The Court sides with the State of California and the TRPA on their interpretation that the new statute changes the doctrine set forth in *Maxwell v. Amoral*, 79 Nev. 323 (1963).

Accordingly, costs in the amount of $241,836.69 are awarded to Defendants State of California and the Tahoe Regional Planning Agency. For the reasons set forth in this Court's Order of February 20, 1991, fees in the amount of $7,500.00 are also allowed as a form of sanction.

SOME GENERAL AND SPECIFIC COMMENTS CONCERNING COVERAGE ISSUES:

The Court has examined the Plaintiff's report on coverage at Uppaway, including the three major appendices which are annexed thereto. The Court has also examined the Defendants' report of land coverage calculations for Uppaway Estates Subdivision and the contentions and studies therein.

In order for the Court's conclusions to make sense, two initial decisions are first necessary. First, the Court sides

with the TRPA and California and rules that the benchmark which should and must be used in this case is not the July 1974 Ray Smith report, but the Novembe. Ray Smith report, which was introduced and admitted at trial.

On the other hand, the Court sides with Mr. Kelly on the issue of whether or not approximately 12,200 sq. ft. of coverage which doesn't appear anywhere in Mr. Smith's calculations should be "grandfathered" in the sense that it has until now played no role in the case and should play no role in calculating the remaining coverage. There is no evidence that Mr. Kelly was, at any time, intentionally overreaching when Mr. Smith made this oversight. And it is fairly easy to charge the TRPA with constructive knowledge of the existing amount of impervious coverage in place at the time the Ray Smith report was filed and the subdivision was "deemed approved". Furthermore, Uppaway was basically in a condition where that amount of impervious coverage was already interfering with natural drainage at the time Mr. Kelly commenced his application process. The TRPA should, as well, live with these historical facts. And, to be consistent, the same treatment needs to be accorded to the footpath to the pier and the 2,310 square feet of compacted earth located at that site.

One final preliminary note. With the comments just made, the parties are not terribly far apart in the manner by which they calculate existing and remaining coverage, although they go about the process quite differently. The Court appreciates the fact that TRPA did combine its map study with on-site measurements and the Court chooses to utilize most of TRPA's interpretations and numbers for its final conclusions

If sixteen lots remain of the original thirty-nine and the existing residential coverage is added to so-called "new development" coverage and so-called "recently approved coverage" and then the total is subtracted from the Ray

Smith November report, there exists, by the Court's calculations, more coverage remaining than is necessary for the purpose of allocating 2,500 square feet per remaining hilltop lot (even with lot 39 coming back into existence) — which is the size of the original building envelope according to either Ray Smith report. The only real difference is that by making some allowances for previous built-out coverage, the hilltop lots would be left with enough space for a driveway perhaps the size of a carport (approx. 380 square feet) which is concededly less than the average driveway allowance to the lower lots under the Smith report.[1]

Expectedly, Mr. Kelly's counsel has seized on the argument that the Trust is entirely innocent in causing any excess coverage that may have occurred as the result of actual building practices by other purchasers, particularly near the lakefront. And, on those lots where full coverage was not utilized, Mr. Kelly's counsel seeks to appropriate the unused portions.

On the other hand, if the Court's decision stands up on appeal, the Uppaway hilltop lots will be given a status allowing purchasers to proceed to buildout in the IPES environment of staged growth without further delay. As it is, Uppaway's building-envelopes represent a variance on coverage substantially exceeding the coverage limitations established by the TRPA at any time.

It is the Court's opinion, then, that if Mr. Kelly wants to sell houses with larger driveways, then perhaps he should

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[1] 212,900 square feet (Nov. Ray Smith report total) minus 181,286 square feet (TRPA calculated coverage) equals 31,614 square feet. Add back 12,203 square feet (pre-existing residence coverage; changes to Downer actual) plus 2,310 feet (compacted path, pre-existing) equals 46,127 square feet. Divide by 16 (number of lots remaining) equals 2,883 square feet (gross allowance per building site). Subtract 2,500 for the actual residence and the result is 383 square feet for the driveway; rounded to 380 square feet.

wait until his lots are afforded better IPES scores. If he wishes to stay with smaller driveways, however, then Mr. Kelly will maintain his hard-won priority. A number of alternative uses, especially engineered grates, are available for non-offending driveway substitutes and some are already in use in Uppaway. The burden to Mr. Kelly represented to have his purchasers suffer some loss of driveway coverage in an area originally designated for cart paths may be substantially outweighed by the benefit he and TRPA receive by not grossly exceeding the original coverage limitations. After all, this subdivision was engineered as a whole to handle a specified amount of runoff at critical periods and the Court is not inclined to surcharge the use for the mere purpose of assuring spacious parking areas, especially when the lake basin ecological balance is at such a critical juncture. [Actually, if the Court had the power, it would order some mitigation work to be accomplished around the pier and pier path because there is evidence of algae blooming in higher proliferation in that area. But such relief appears to be outside these parties and pleadings.]

Accordingly, Mr. Turner, or some other qualified person of Mr. Kelly's selection, may prepare a new plat map depicting the locations of lots 32 through 39 with 2,500 sq. ft. for the building site and an additional 380 sq. ft. of driveway coverage per lot.

DATED this 1st day of November, 1991.

/s/ Charles M. McGee
DISTRICT JUDGE